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Supreme Court, U.S.
FILED
APR 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

ARNOLD L. VIA,

Petitioner

v.

DONALD E. WILLIAMS, Commissioner

and

COMMONWEALTH OF VIRGINIA
Division of Motor Vehicles,

Respondents

WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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32pp

QUESTIONS PRESENTED FOR REVIEW

1. Is a personalized automobile license plate, which is purchased at extra cost by a vehicle owner in response to an offer by the state division of motor vehicles, a "public forum" or a "limited public forum" within the meaning of prior Court decisions?

2. Does a state official in charge of a custom license plate program have unlimited authority to censor atheistic references on such plates while permitting certain other religious references, or is such authority circumscribed by the first and ninth amendments prohibiting the unlawful establishment of religion and the unlawful restraint of expression, or by the fourteenth amendment requiring equal application of the law?

3. Does the failure to establish clear written regulations for the enforcement of any lawful censorship policy, or the disallowance of such plates solely on the basis of subjective offense to one or more private persons, violate the due process clause of the fourteenth amendment and the establishment of religion clause of the first amendment?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Arnold L. Via, and the Respondents, Donald L. Williams, Commissioner of Motor Vehicles for the Commonwealth of Virginia, and the Commonwealth of Virginia, Division of Motor Vehicles.

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OPINIONS BELOW

The decision of the Division of Motor Vehicles to revoke the Petitioner's license plate, communicated by letters dated April 16, 1985, and May 13, 1985, is set forth in the Appendix beginning at A- 18. The opinions of the Circuit Court of Augusta County, Virginia, dated November 14, 1985, and December 13, 1985, are reproduced at A-3. The opinion of the Supreme Court of Virginia upholding the decision of the circuit court is set forth at A-1.

JURISDICTION

The decision of the Supreme Court of Virginia denying the Petitioner's appeal was rendered on November 18, 1986. The Supreme Court of Virginia denied the Petitioner's Petition for Rehearing on January 16, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The first amendment to the United States Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."

The ninth amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The fourteenth amendment provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Va. Code Ann. § 46.1-102 states: "Every license plate and decal issued by the Division shall remain the property of the Division and shall be subject to be revoked, cancelled and repossessed by the Division at any time as in this title provided."

V.C.A. § 46.1-105.2 provides:

> **§ 46.1-105.2. Issuance of license plates with reserved numbers or letters.**--(a) The Commissioner may, in his discretion, reserve license plates with certain registration numbers or letters or combinations thereof for issuance to persons requesting license plates so numbered and/or lettered and may provide forms for use by persons in submitting requests for such plates.
>
> (b) In addition to any other fees and charges imposed by law, a fee of ten dollars shall be charged upon the issuance to any person of a license plate or set of plates bearing a number specially assigned or reserved to such person. Such fee shall be an annual fee and the revenues derived therefrom shall be disposed of as provided in § 46.1-167.

STATEMENT OF THE CASE

For many years, the Respondent Virginia Division of Motor Vehicles ("DMV") has engaged in a marketing program for what is termed a "Communiplate," or personalized automobile license plate. Many other states have similar programs. Brochures issued by the DMV invite Virginia motorists to use their Communiplates for the expression of their own points of view, opinions, and ideas upon payment of an extra $10 annual fee (A-15). Around 1982, the DMV issued to Arnold L. Via, Petitioner [hereafter "Petitioner" or "Via"], a reserved custom Communiplate reading "ATH-EST" [hereafter "the plate"]. Via, a retired merchant seaman and Navy veteran, is an atheist. This litigation arose when, on April 16, 1985, B.F. Moore, a DMV employee, wrote a letter to Via demanding surrender of the plate because an unidentified "complainant <u>believes</u>

that [the plate] refers to 'atheist' and is offended that we allow such a license to be displayed." (Emphasis added.) (A-18). Moore also cited alleged DMV "policy not to issue license [sic] that may be offensive to any person or group."

In response, Via confirmed that the plate did, in fact, refer to "atheist," and he refused to surrender the plate. He also asked for the time deadline for his compliance. By letter dated May 13, 1985, Moore gave Via a 45-day deadline which appeared to set a date of June 27, 1985 (A-19). Moore again demanded the surrender of the plate and amplified his originally stated "policy" that, since DMV does "not issue any license referring to a diety [sic], we should also not issue licenses referring to a non-diety [sic] as either group [sic] may be offended by the other." At no time did Moore cite Virginia

statutory or regulatory authority to Via, and the Respondents admitted in their pretrial responses and at trial that no regulations have been formally published.

On June 25, 1985, Via, by counsel, filed a Bill for Injunction in the Circuit Court of Augusta County (A-20) and obtained a Decree, ex parte, temporarily restraining the DMV and Commissioner Williams from revoking the plate until a hearing was held on the merits, continued by agreement of the parties to September 3, 1985. On September 3, 1985, the Circuit Court of Augusta County heard testimony and argument by counsel and requested further written argument. Commissioner Williams admitted on examination by Via's counsel that he personally considered the plate to be offensive but denied that his offense was based on his personal religious convictions (A-32). The Respondents also stipulated that the

DMV had issued certain plates which have religious connotations (A-27).

By letter opinion of November 14, 1985 (A-3), the circuit court denied Via's request for a permanent injunction, and by letter opinion of December 13, 1985 (A-8), it denied Via's Motion for Reconsideration. By its final Order of February 24, 1986 (A-11), the circuit court incorporated its letter rulings and denied Via's request for a temporary injunction against the revocation of the plate pending appeal.

On appeal to the Supreme Court of Virginia (A-34), that court refused, on November 18, 1986, to grant the appeal without stating its grounds. It likewise refused the Petitioner's timely request for rehearing on January 16, 1987.

REASONS FOR GRANTING THE WRIT

I. A PERSONALIZED AUTOMOBILE LICENSE PLATE IS A PUBLIC FORUM OR LIMITED PUBLIC FORUM WHICH IS ENTITLED TO FIRST AMENDMENT PROTECTION UNDER THE PRECEDENTS OF THIS COURT.

The decisions of this Court have clearly established that the government may create a public forum for the expression of ideas by intentionally opening a nontraditional forum for public discourse. E.g., Cornelius v. NAACP Legal Defense & Education Fund, 105 S. Ct. 3439, 3439 (1985); Widmar v. Vincent, 454 U.S. 263, 267 (1981). In determining whether such a forum has been created in particular circumstances, the Court has looked to the policy and practice of the government with regard to the place which is sought to be used for expression, and has examined the nature of the property and its compatibility with expressive activity to discern

the government's intent. Id. Thus, in Widmar v. Vincent, supra, the Court held that a state university's express policy of making its meeting facilities available to student groups evidenced a clear intent to create a public forum. Therefore, the university's prohibition on the use of such property on the basis of religions content was found to be violative of the first amendment. See also Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); United States v. Grace, 461 U.S. 171 (1983).

The same general issue is presented in this case. As the record below demonstrates, the DMV initiated a policy of inviting vehicle owners to pay an extra fee in order to purchase license plates with personalized messages. The brochure promoting the use of such license plates specifically states that motorists are encouraged "to express a thought or idea on a Virginia license

plate." It further urges: "Use your imagination. Think of a message you would like to communiplate [communicate] to other motorists. You could tell people who you are . . ., what you do . . ., what you like . . ., or don't like . . ." (A-15). Clearly, the intent of the DMV was in fact to establish license plates as a public forum for all varieties of messages. By virtue of the personalized license plate program, automobile license plates in Virginia are now not only compatible with expressive activity, they are in fact an encouraged medium of expressive activity. Having created such a public forum, the DMV is restrained by the first amendment from restricting the use of this medium on an impermissible basis.

Moreover, this Court has established that even if it is shown that property is not a public forum, control over access to a nonpublic forum

may be based on subject matter only if the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral. Cornelius v. NAACP Legal Defense & Education Fund, supra, 105 S. Ct. at 3451; Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 49 (1983). In this case, therefore, even if it is assumed for the sake of argument that the personalized Virginia license plates are not a public forum of any kind, the DMV must still prove that the denial of expression in this case was reasonable and viewpoint-neutral. The record below indicates, however, that the denial was in fact based on the viewpoint of Via.

This Court has already found that an automobile license plate and the message it contains can raise serious and important issues under the first amendment. See Wooley v. Maynard, 430 U.S.

705 (1977). Similarly, this case raises significant first amendment issues. The issue of the extent of first amendment protection to be given to messages on personalized license plates is of interest not simply to the Petitioner, who has suffered a deprivation of his first amendment rights by virtue of the denial of his expression based on the DMV's views of his atheistic beliefs, but is also important to all other owners of personalized plates. In light of the proliferation of personalized license programs throughout the country, this case presents an timely opportunity for this Court to settle an important national issue by clarifying the extent to which states may censor the content of license plate messages once they have solicited fees for participating in the programs.

II. THE DIVISION OF MOTOR VEHICLES VIOLATED THE PETITIONER'S FREEDOM OF EXPRESSION UNDER THE FIRST, NINTH, AND FOURTEENTH AMENDMENTS BY CENSORING HIS "ATH-EST" LICENSE PLATE.

The decisions of this Court make clear the fact that the most exacting scrutiny is required when a state undertakes to regulate speech on the basis of its content. See, e.g., Carey v. Brown, 447 U.S. 455 (1980); United States v. O'Brien, 391 U.S. 367 (1968). Thus, when the state creates or opens a public forum inviting expression by the public, in order to justify discriminatory exclusion from such forum based on the content of expression, the state must show that its exclusion is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Widmar v. Vincent, supra, 454 U.S. at 269-70.

In the present case, the DMV has revoked

Via's "ATH-EST" license plate solely on the basis of its content--Via's apparent approval or promotion of atheism. The record below demonstrates that although this was indeed the basis for the revocation, the DMV has never articulated any compelling state interest for this censorship. In fact, the reasons advanced by the DMV for revocation of the license plate relate to the desire not to offend anyone, and specifically to the fact that one individual was offended (A-18). This Court has long held, however, that non-obscene speech or expression may not be prohibited merely because it may be offensive to others. E.g., Spence v. Washington, 418 U.S. 412 (1974); Cohen v. California, 403 U.S. 15 (1971).

In addition, the asserted justifications of the DMV for revoking the license plate on the basis of not wanting to appear to endorse a religious belief (A-19) are belied by the fact that

numerous other religiously themed license plates have been approved by the DMV. These plates include words such as "SAVED," "PRAY," and "RISEN" (A-27). Moreover, the DMV's claim that it revoked the plate out of an obligation to maintain religious neutrality is precluded by the holding of Widmar v. Vincent, supra, in which the Court rejected the claim that the establishment clause of the first amendment prevented a university from permitting meetings of religious groups on its campus. As the Court noted in Widmar, an "equal access" policy in connection with opening a public forum to all messages would not run afoul of the three-pronged establishment clause test of Lemon v. Kurtzman, 403 U.S. 602 (1971), for it is unlikely to be found that the primary effect of such a policy would be to advance religion.

In the present case, the DMV can hardly

argue that issuance of the "ATH-EST" license plate is violative of the establishment clause as an endorsement or advancement of religion, for the "Communiplate" program is by its own terms intended to allow messages which are personalized to the owner of the plate. For this reason, it is impossible to imagine that a viewer of Via's plate could ascribe the message to the state rather than to Via.

Therefore, the state is unable to demonstrate any compelling interest in denying Via's expression. Moreover, even if it is assumed that such an interest could be shown, the facts show clearly that the DMV has acted arbitrarily and unequally in implementing the policy which allegedly is intended to advance this interest. By issuing some license plates with religious themes and revoking or denying others, the DMV is clearly denying the equal protection of the laws as

required by the fourteenth amendment. In fact, the DMV's policy appears to demonstrate special deference to religions as opposed to atheism, which has been held to be unconstitutional by this Court. Torcaso v. Watkins, 367 U.S. 495 (1961). It is therefore obvious that even if one accepts the contention of the DMV that a compelling state interest exists in not issuing religiously themed license plates, it has totally failed to demonstrate that its exclusion policy is narrowly tailored to achieve that interest. Consequently, this Court must find that Via's freedom of expression has been unconstitutionally abridged by the DMV.

III. THE STATE'S FAILURE TO ESTABLISH CLEAR STANDARDS FOR CENSORING LICENSE PLATE MESSAGES, AND THE REVOCATION OF LICENSES ON THE BASIS OF SUBJECTIVE OFFENSE TO A SINGLE PRIVATE INDIVIDUAL, VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS.

The record below clearly establishes that the DMV has failed to articulate any standards by which license plate applications are evaluated. Even more egregious is the fact, admitted by the Respondents, that the complaint of one individual will result in the revocation of a personalized license plate which has already been issued. This failure of the DMV to establish any standards with regard to the suppression of expression which it has invited is violative of due process as guaranteed by the fourteenth amendment, and in the present case constitutes an establishment of religion in violation of the first amendment.

The transcript of Commissioner Williams's testimony demonstrates the dangers inherent in permitting a state official to have unfettered discretion to deny the expression of beliefs. He stated at trial that after the license plate was brought to his attention, he personally considered it to be "offensive" based on "what I consider to be Virginian, and based on the rationale about our license plate system." (A-31-32). At other points in the litigation, Williams variously maintained that he did not find the plate offensive (Appellee's Brief in Opposition at Virginia Supreme Court at 1) and stated that the United States was established as a religious nation and equated Via's license plate with obscenity (this statement was made in a television interview after trial in January 1987 on WWBT-TV in Richmond, Virginia; this after-trial evidence should be subpoenaed and included in the record

as material evidence of Commissioner Willams's real basis for his decision). Further testimony showed a totally informal decision-making process at DMV with regard to license plate decisions, including the assertion that certain deities were affirmatively permitted while others were not This Court has repeatedly addressed the dangers of allowing public officials to have wide latitude in matters of censorship, Cox v. Louisiana, 379 U.S. 536 (1965), and in matters of religious preference, Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948). Due process requires that any statute or regulation having the effect of curtailing free expression contain reasonably clear guidelines so as to prevent official arbitrariness or discrimination in its enforcement. Smith v. Goguen, 415 U.S. 566 (1974); Grayned v. City of Rockford, 408 U.S. 104 (1972).

The event which triggered the action against Mr. Via was the complaint of a private individual claiming offense at the plate. Other plates of a religious nature which have been issued are not revoked by the DMV on the grounds that complaints about those have not been received. Thus, the situation closely parallels the facts in Larkin v. Grendel's Den, 459 U.S. 116 (1982), in which the Court struck down a system which permitted private religious organizations to veto applications for liquor licenses. Such a system, the court held, violated the establishment clause of the first amendment by breaching the traditional "wall" of separation between church and state.

In short, the standardless system by which the DMV determines which license plates are offensive and thus revokable violates due process

and in effect establishes religion by favoring religion over nonbelievers. Cf. Torasco v. Watkins, supra.

CONCLUSION

For the foregoing reasons, it is apparent that the Virginia Division of Motor Vehicles has violated the first, ninth, and fourteenth amendments in deciding to revoke the Petitioner's license plate. A definitive decision in this case at this time could serve to limit the possibility of future litigation over the many other plates in other jurisdictions. Accordingly, the Petitioner requests this Court to grant his Petition for a Writ of Certiorari to the Supreme Court of Virginia.

Respectfully submitted,

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86 1668

No._____

Supreme Court, U.S.
FILED
APR 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

ARNOLD L. VIA,

Petitioner

v.

DONALD E. WILLIAMS, Commissioner

and

COMMONWEALTH OF VIRGINIA
Division of Motor Vehicles,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

APPENDIX

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3998

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 18th Day of November, 1986.

Arnold L. Via,

Appellant,

against Record No. 860438

Donald E. Williams,
Commissioner, et al., Appellees.

From the Circuit Court of Augusta County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,
Teste:

David B. Beach, Clerk

By:

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 16th day of January, 1987.

Arnold L. Via, Appellant,

against Record No. 860438

Donald E. Williams,
Commissioner, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 18th day of November, 1986, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

TWENTY-FIFTH JUDICIAL CIRCUIT
OF VIRGINIA

Thomas H. Wood
Augusta County Courthouse
P. O. Box 689
Staunton, Virginia 24401
(703) 885-8931

November 14, 1985

H. Watkins Ellerson, III, Esquire
Carter and Ellerson
P. O. Box 31
Orange, VA 22960-0023

The Hon. Jeffrey A. Spencer
Assistant Attorney General
Office of the Attorney General
of Virginia
101 North Eighth St.
Richmond, VA 23219

Re: Arnold L. Via v. Donald E. Williams, Commissioner, et al

Gentlemen:

First, I would like to apologize to you for my inexcusable delay in advising you of my decision. Both of you filed your briefs in accordance with the time schedule established, but, as a result of a breakdown in communications between the Clerk's Office and my office, I was not aware until recently that the briefs had been filed.

In order to explain my decision, a brief recitation of what I view as the relevant facts would appear to be appropriate.

Mr. Via acquired a "Communiplate" reading "ATH-EST" from the Division of Motor Vehicles in 1982. Mr. Via is an atheist, and he acquired this particular license plate for the purpose of publicly expressing his views. An unnamed citizen, claiming to be offended by this license plate, registered a formal complaint with the Division of Motor Vehicles in 1985. As a result of this complaint, the Division is attempting to repossess this plate. The DMV has offered to give Mr. Via another "Communiplate" or, in the alternative, issue a "regular" license plate and refund the extra fee to him.

The sale of "Communiplates" generates substantial revenue for the Commonwealth. The popularity of these plates is increasing annually, and the plates are aggressively marketed by the Division.

The Commissioner has appointed an informal committee to regulate the permissible content of these plates. So far as is relevant to this case, the Commissioner maintains that he will permit no "Communiplate" expressing any type of religious belief. The weight of the evidence would tend to support the Commissioner's position on this point, although he apparently has tried to draw some distinction between gods he categorizes as mythological and those which do not fit into this category. The Commissioner openly admits that license plates which violate his policy have been issued by accident. In those cases, nothing is done until a complaint is received.

By statute, every motor vehicle to be operated on the highways of this State must be registered. Section 46.1-41 of the Code of Virginia. The Division of Motor Vehicles is required to furnish license plates to every owner whose motor vehicle is registered, and that motor vehicle cannot be operated without those license plates being displayed. Section 46.1-99. The only statutory requirements for these license plates and decals is that they display the name of the state, the registration number assigned to that motor vehicle and the year or month and year issued, and that these plates be clearly visible. The license plates and decals issued by the Division remain the property of the Division. Section 46.1-102. With a few exceptions (see e.g. sections 46.1-104.1 through 46.1-105.13), the decision as to whether to issue any "Communiplates" at all is left to the discretion of the Commissioner. Section 46.1-105.2(a). Considering these Sections together, it is apparent that any license plate issued remains the property of the division, and that the make-up of the plates issued is left almost entirely to the discretion of the Commissioner. Accordingly, it is my opinion that no person has any statutory "right" to any particular license plate.

As Mr. Ellerson so very ably demonstrated, the Virginia Constitution and Statute of Religious Freedom afford to the citizens of this Commonwealth absolute freedom from governmental influence upon their beliefs and opinions concerning religious matters. Virginia Constitution, Article I, Section 16, Virginia Code, Section 57-1. Accordingly, neither the Commissioner nor any other agency or official of the govern-

ment can prevent Mr. Via from holding and espousing any belief he may have concerning religion. Similarly, the Commonwealth could not require him to express a belief with which he disagreed. Virginia Code Section 57-1, Wooley v. Maynard, 430 U.S. 705 51 L.ED.2d 752 (1977). However, in this case, Mr. Via seeks to use State property to express his beliefs, and he is asking this Court to enjoin the Commissioner of the Division of Motor Vehicles from exercising the discretion reposed in him by the General Assembly.

Based on the evidence, the Court is satisfied that the Commissioner has adopted a policy, the proper execution of which would prevent the display of any type of religious belief upon a license plate issued by the Division. There is no basis in the evidence for a finding that the Commissioner has singled out Mr. Via for special treatment because of his beliefs concerning religion. Accordingly, it is my view that there simply is no constitutional issue involved in this case.

Furthermore, it is my opinion that there is no significance to the distinction between refusing to issue a particular license plate and repossessing one previously issued. As previously pointed out, the license plates are State property and were furnished to Mr. Via pursuant to statutory requirement. Since the Division has no basis to revoke the registration issued to this motor vehicle, it is obligated to issue new license plates to Mr. Via when the ones previously issued are repossessed.

Accordingly, it is my opinion that the

prayer of the Petition for an Injunction filed by Mr. Via should be denied, and that the Petition should be dismissed. I would appreciate it if Mr. Spencer would prepare an appropriate Order, submit it to Mr. Ellerson for his endorsement, and, in turn, submit it to me for entry. This Order should authorize the Division to retrieve the license plates in question and should direct the Division to replace these plates with ones that are suitable. This Order should contain a provision noting Mr. Via's objection to the action of the Court.

Sincerely yours,

Thomas H. Wood

THW/gl

TWENTY-FIFTH JUDICIAL CIRCUIT
OF VIRGINIA

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December 13, 1985

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The Hon. Jeffrey A. Spencer
Assistant Attorney General
Office of the Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, VA 23219

Re: Arnold L. Via v. Donald E. Williams, Commissioner

Gentlemen:

Please excuse my delay in responding to your earlier correspondence.

As previously stated, it is my view that the statutory scheme adopted by the General Assembly does not confer upon any person, with a few exceptions which are not relevant to this case, any

right to any particular tag. Furthermore, it is my opinion that no person has a constitutional right to use State property to espouse a particular religious belief. As adopted, these statutes do not give rise to any constitutional questions. Undoubtedly, the Commissioner can create problems of constitutional dimension for himself by adopting ill-advised policies. However, the evidence clearly established that he has not yet created any problems for himself.

For these reasons, it is my opinion that the Motion for Reconsideration should be denied.

Normally, an appellant is entitled to have the execution of the judgment from which he appeals suspended for a suspended for a period of time sufficient to enable him to pursue his appeal. There is no reason not to do that in this case. However, the Order to be entered in this case simply denies Mr. Via's request for an injunction. The suspension of the execution of this Order will do nothing more than leave the parties where they were before this action was ever brought. The temporary Restraining Order which was previously entered in this case was for the sole purpose of maintaining the status quo until the matter could be heard in this Court. This temporary Restraining Order would not, in my view, continue in force once the final Order had been entered.

If you have any questions, please feel free to contact me. If not, I would appreciate it if Mr. Spencer would prepare an appropriate Order, submit it to Mr. Ellerson for his endorsement and, in turn, submit it to me for entry. this

Order should note the complainant's exception to the ruling of the Court.

Sincerely yours,

Thomas H. Wood

THW/gl

VIRGINIA: IN THE CIRCUIT COURT OF AUGUSTA COUNTY

ARNOLD L. VIA,

Complainant,

v.

DONALD E. WILLIAMS, COMMISSIONER,

and

COMMONWEALTH OF VIRGINIA,
DIVISION OF MOTOR VEHICLES,

Respondents.

ORDER

This matter came on to be heard on August 3, 1985, upon Complainant's Bill for Injunction and Respondents' Answer, upon evidence taken ore tenus, upon memoranda and reply memoranda filed by counsel for the parties, and upon argument of counsel.

Upon consideration whereof, for reasons stated more fully in this Court's letter opinion dated November 14, 1985, the Court finds as fol-

lows: (1) that license plates issued by the Commissioner remain the property of the Commonwealth of Virginia pursuant to Va. Code § 46.1-102; (2) that the make-up of such plates is left almost entirely to the discretion of the Commissioner; (3) that no person has a statutory right to any particular license plate; (4) that the Commissioner has adopted a policy to prevent the display of any type of religious belief upon such license plates; (5) that there is no basis in the evidence for finding that the Commissioner has singled out Complainant for special treatment as to his license plates because of Complainant's beliefs concerning religion; and (6) that there is no significance to the distinction between refusing to issue a particular license plate and repossessing one previously issued.

Accordingly, the Court finds that although the Commonwealth cannot prevent Complainant from

holding and espousing any belief he may have concerning religion and cannot require Complainant to express a belief with which he disagrees, there is no violation of any of Complainant's constitutional or statutory rights in the repossession of his "ATH-EST" license plates under the circumstances existing in this case.

It is, therefore, ADJUGED, ORDERED and DECREED that the Petition for an Injunction filed by complainant be and the same is hereby denied and dismissed, to which action Complainant, by counsel, objects and excepts. Complainant's Motion for Reconsideration is also denied. Complainant's Motion to extend the temporary stay of Respondent's revocation of Complainant's license plate, which stay was entered July 1, 1985, is also denied and said temporary stay is hereby ended, the Court being of the opinion that it has no authority to grant a further stay under the

circumstances of this case.

The Clerk of this Court shall forward an attested copy of this Order to Assistant Attorney General Jeffrey A. Spencer, 101 North Eighth Street, Richmond, Virginia 23219.

ENTER: 2/24/86

T.H. Wood
Thomas H. Wood, Judge

SEEN AND OBJECTED TO:

H. Watkins Ellerson, III, p.q.
P. O. box 1080
Orange, VA 22960
(703 672-2109

A COPY:
TESTE:

Jeffrey A. Spencer, p.d.
Assistant Attorney General
101 North 8th Street
Richmond, Virginia 23219

COMMUNIPLATE

Communiplate vb--plated;--plating 1. to express a thought or idea on a Virginia license plate 1. to drive a vehicle which displays a set of CommuniPlates.

Drive Your Message Home.

Literally drive your message home with DMV's CommuniPlates.

They're special reserved license plates you can create yourself using all letters, all numbers or a combination of both, whatever you choose to get your message across.

If you've never communiplated before, or even if you think you're a master communiplator, follow our suggestions, and you'll be on the road to better communiplations in no time.

CommuniPlate Basics.
* Available for passenger vehicles only.
* May be composed of 2-6 letters and/or numbers.
* Use half a space anywhere in the combination (optional).
* No punctuation or symbols.
* Cost $10 annually in addition to registration fees. (A real bargain if you consider people in Hawaii pay $100 a year for special plates.)

Use your imagination.

Think of a message you'd like to communiplate to other motorists. You could tell people who you are GEORGE, what you do DOCTOR, what you like

SAIL 81, or don't like NO TAX, where you live GRUNDY, where you went to school G MASON, or what you do in your spare time GO RAMS. You might even communiplate witty remarks and pleasantries HOWR U or advertise your business PIZZA 1.

Create a plate!

Write your own unique license plate, following the basic guidelines above. If your message is too long, try substituting a letter or number for a word or part of a word. for example, "B" could mean be or bee, "C"--sea or see, "I"--eye or aye, "R"--are or er. Number 2 could mean to or too, 4 could be for or fore, and 8 could be used for "ate" as in CRE8. (Your former English teacher may cringe, but who cares as long as it fits!)

Reserve your CommuniPlate ASAP.

CommuniPlates are one-of-a-kind, so file your application quickly. You can find out immediately if your combination is available by applying in person at a nearby DMV branch office. Or, mail your application and find out in a few weeks. Application forms are available at all DMV offices. Be sure to indicate your top three choices. If someone else already has your first choice, you will get your second or third choice, if available.

Don't wait.

CommuniPlates can be reserved anytime, so you don't have to wait until your old plates expire. The annual $10 reservation fee will be prorated according to the number of months remaining in

your registration period.

A bit of trivia.

License plate buffs may be interested to know that Virginia was the 48th state to offer reserved license plates composed of five or more letters and/or numbers. All 50 states now offer multi-letter plates.

According to available information, Connecticut was the first state to offer personalized license plates sometime around 1937; California has issued the most--about 900,000 are currently valid, and Hawaii and North Dakota have the most expensive--$100 a year, in addition to registration fees.

COMMONWEALTH OF VIRGINIA
Division of Motor Vehicles
2300 West Broad Street

April 16, 1985

Mr. Arnold L. Via
Route 1, Box 343B
Grottoes, VA 24441

Dear Mr. Via:

It has been brought to our attention that you have been issued license plates ATH-EST. The complainant believes that this refers to "atheist" and is offended that we allow such a license to be displayed.

It is our policy not to issue license that may be offensive to any person or group of persons. Therefore, you are requested to select another Communiplate by completion of the attached application and return it to this office with a copy of this letter. If your choice is available, we will issue the license without any cost to you.

If you do not wish another Communiplate, please advise so that we may issue a regular series license and we will refund a portion of the reserved license fee previously paid by you.

Sincerely,

B. F. Moore, Assistant manager
Titles and Registration Department
BFM/dcl

COMMONWEALTH of VIRGINIA
Division of Motor Vehicles
2300 West Broad Street

May 13, 1985

Mr. Arnold L. Via
Prison Atheist League of America, Inc.
Route 1, Box 580
Grottoes, Virginia 24441

Dear Mr. Via:

This is in response to your letter of April 22 concerning my request for you to make another selection for your communiplates.

For the same reason that we do not issue any license referring to a diety, we should also not issue licenses referring to a non-diety as either group may be offended by the other.

Please execute the enclosed application indicating some other choice for communiplates and return to me within forty-five (45) days so we may issue you another set of license plates. if you do not desire another set of communiplates, please advise me so that I may have license plates of the general series issued and refund that portion of the reserved fee due to you.

Thank you for your attention to this matter.

Sincerely,

B. F. Moore, Assistant manager
Titles and Registration Division
BFM/rj

VIRGINIA IN THE CIRCUIT COURT OF AUGUSTA COUNTY:

ARNOLD L. VIA

Complainant

v.

DONALD E. WILLIAMS, Commissioner
and
COMMONWEALTH OF VIRGINIA,
Division of Motor Vehicles
2300 West Broad street
Richmond, VA

Respondents

BILL FOR INJUNCTION

Comes now Complainant, by counsel, who moves the Court for the following relief:

1. Complainant is a resident of Augusta County, Virginia, who has had issued to him by Respondents a Virginia motor vehicle license plate, "ATH-EST."

2. By letter dated May 13, 1985, B. F. Moore, agent for Respondents, advised Complainant that his license plate would be revoked within 45 days of said date (by June

27, 1985) if said plate was not returned. By earlier letter dated April 16, 1985, the said B. F. Moore had advised Complainant that the plate was deemed offensive by an undisclosed individual who had apparently filed a complaint with Respondent Division of Motor Vehicles.

3. In the letter of May 13, 1985, the said B. F. Moore advised Complainant that, because the plate referred to a "non-diety" it would have to be returned, as plates were not issued which referred "to a diety." Copies of said letters are attached hereto.

4. Respondents' actions in this matter, if carried to their ultimate ends, would constitute action pursuant to an unlawful establishment of religion in violation of the First Amendment to the United States Constitution, Article I, Section 16 of the

Constitution of Virginia and Virginia Code Section 57-1 and 57-2, as amended.

5. Respondents' prospective actions are also a restraint on Complainant's right to freedom of speech and publication in violation of the First Amendment of the United States Constitution and Article I, Section 12 of the Constitution of Virginia.

6. Respondents' prospective actions are also in furtherance of a deprivation of Complainant's right to due process of law and freedom from governmental discrimination upon the basis of religious conviction (or lack thereof), in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 11 of the Constitution of Virginia.

7. The grounds for relief alleged by Complainant herein are alleged in the disjunc-

tive as well as the conjunctive, any of them being sufficient, standing alone, to provide Complainant's relief as requested below.

8. The enabling statute under which Respondent Commissioner has issued the plate to Complainant, Virginia code Section 46.1-105.2, as amended, does not set forth any restrictive grounds for qualified issuance of reserved license plates as claimed by Respondents' agent, B. F. Moore, in his letters to Complainant. Therefore, Respondents to not have the statutory authority to revoke Complainant's license plate for the grounds so stated. Further, there is no statutory authority for Respondents to revoke said plates on the grounds enumerated by Respondents' agent in his letters to Complainant.

9. Assuming, arguendo, that said plates are

issued by Respondents at will and may be revoked at will, nevertheless, their actions as contemplated are pursuant to the prohibited purposes as alleged above.

10. The threatened actions by Respondents against Complainant constitute a clear and present danger that Complainant will not be able to operate his motor vehicle lawfully on the highways of this State pending final determination of this matter; therefore, the reasonable and appropriate relief for Complainant is the issuance of temporary and permanent injunctions against Respondents.

11. Respondents' threatened actions as alleged herein constitute a willful, deliberate and wanton disregard of Complainant's constitutional and statutory rights as guaranteed by the authorities cited above, which, therefore, entitle Complainant to

recovery of actual compensatory damages and punitive damages, as well as attorney's fees for having to institute and conduct this suit to protect his rights thereunder.

WHEREFORE, Complainant asks for an immediate temporary injunction against Respondents prohibiting them from revoking or seizing his license plates pending the resolution of this suit; that Complainant be awarded a permanent injunction prohibiting Respondents from revoking or seizing his license plates; that Complainant be awarded compensatory damages of $500.00 as a result of the time and expense involved in responding to Respondents' threats; that Complainant be awarded punitive damages against Respondents in the amount of $10,000.00 for willful, deliberate and wanton disregard and violation of his constitutional and statutory rights; and that Complainant be awarded attorneys fees

and the costs of these proceedings.

ARNOLD L. VIA

BY:_____p. q.

I hereby certify that a copy of the foregoing was mailed to Respondents at the above address, and to the Office of the Attorney General, Supreme Court Building, Richmond, Virginia 23219 on the ____day of _____, 1985.

_____

CARTER & ELLERSON

Attorneys and Counsellors at Law

H. Watkins Ellerson, III
Henry Lee Carter

Timothy K. Sanner

August 26, 1985

Jeffrey A. Spencer, Esquire
Assistant Attorney General
Supreme Court Building
Richmond, VA 23219

Re: Via v. DMV

Dear Mr. Spencer:

This will confirm my visit with Paula Kripaitis on Friday, August 23, to review with her some of the plates that have been issued with an arguably religious theme. I trust that we can stipulate that the following plates are currently issued and outstanding:

SAVED, CLERGY, PRAY, PRAYER, HE IS, XMAS, RISEN, PTL, DEACON, YESHUA, ZEUS, ISLAM, HINDU, JIHAD.

In our last conversation I told you that we would wish to defer a court decision on the issue of damages until the basic issue of the injunction is decided by a higher court, inasmuch as both of us have indicated an intent to appeal an adverse

decision from the trial court. In any event, we will need to amend our complaint to allege the specific federal statutory grounds for recovery of damages. I hope you will agree to that.

We will also excuse Mr. Stein from his subpoena. Thanking you in advance for your cooperation, I am

Very truly yours,

H. Watkins Ellerson, III

cc: Mr. Arnold L. Via

Transcript at p. 3 D. WILLIAMS - DIRECT

Q. Now, you never had any formal regulatory process, whereby a formal regulation was issued, establishing the guidelines for this process, have you?

Williams: I would say no formal process, other than the fact that we tried to draw on experience from other states, and what combination of numbers that they saw fit to screen out.

Transcript at pp. 10-13 D. WILLIAMS - DIRECT

Q. Do you consider the "ATH-EST" plate to be offensive?

A. Yes, I do.

Q. Is that based on your personal religious convictions?

A. No, it's not based on my personal religious convictions.

Q. Okay. To whom is it offensive?

A. It's offensive to several people that have discussed it in the community at large. And I say the community at large is probably surrounded around where Mr. Via might reside, that they see this license plate daily, or frequently they actually see it on the road.

Q. Are you saying that you've gotten more than one complaint?

A. The. . .The complaint was registered through an individual, based on citizens complaining to that individual, and it registering--coming to my office.

Q. And...

A. In other words, it only takes one complaint to come to my office before it gets acted on.

Q. I understand.

A. If I would have had...If I would have had one complaint, if it hadn't have been from this community at large, if it was in--could have been

in Norfolk--if that community complained to me about that license plate...And once I saw that license plate being issued, then I would have acted to have had that license plate recalled, the same as I did recently.

Q. Are these...So...So you were told, in a secondhand fashion, by the unknown, undisclosed complainant...

A. It was...It was offensive to this individual, also.

Q. I understand that. But you were also told by this individual that there were others who were similarly offended?

A. Yes.

Q. And then, on the basis of this report of several people being offended, you determined, in your own standards, that it was offensive personally to you, as well?

A. I would say that, based on what I consider

to be Virginian, and based on the rationale about our license plate system, I would have considered it to be offensive; yes.

Q. Now, you indicate in your memorandum--you-all have argued that you should have complete discretion as to what you will and will not issue, under the reserved license plate section...That is you opinion, is it...That is your position, is it not?

A. That is my position; yes.

. . . .

Q. Well, my question is, should the Commissioner, in this case--are you asking the Courts to find that the Commissioner should have absolute total discretion and control over the combinations to be issued on these plates, without having to be confined by, or restricted by, or made reference to, any external standards to go by? That the personal, individual discretion

of the Commissioner should be the sole deciding factor?

A. I believe that is a responsibility that's been spelled out in the Motor Vehicle statute, that would give the Commissioner of Motor Vehicles that responsibility.

Q So your answer is--to my question is yes?

A. That's correct.

ASSIGNMENTS OF ERROR

1. The trial court erred in denying the permanent injunction against the revocation of the Plate because:

a. The procedure followed and standards set for the attempted revocation of the Plate are inadequately established in law, are void for vagueness and thus constitute a denial of due process to which Mr. Via is entitled under Amendments V and XIV of the U.S. constitution and Article I, §11 of the Constitution of Virginia.

b. The attempted revocation of the Plate is an unlawful establishment of religion in violation of the First and Fourteenth Amendments to the U.S. Constitution, Article I, §16 of the Constitution of Virginia, and Va. Code §57-1.

c. The attempted revocation of the Plate is an

unlawful interference with the free exercise of Mr. Via's beliefs concerning religion in violation of the foregoing authorities and the Ninth and Tenth Amendments to the U.S. Constitution and Article I, §17 of the Constitution of Virginia.

d. The Plate is a protected medium of expression created and encouraged by the Commonwealth of Virginia and its authorized agencies and deputies and is available to Mr. Via as such, within the meanings of the First Amendment to the U.S. Constitution and Article I, §12 of the Constitution of Virginia.

2. The trial court erred in denying Mr. Via's request for a temporary injunction prohibiting the Plate's revocation pending appeal, having the authority to do so on conditions, notwithstanding the entry of the final Order

denying the permanent injunction.

No. 86-1663

Supreme Court, U.S.
FILED
MAY 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ARNOLD L. VIA,

Petitioner

v.

DONALD E. WILLIAMS, Commissioner

and

COMMONWEALTH OF VIRGINIA
Division of Motor Vehicles,

Respondents.

WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS

MARY SUE TERRY
Attorney General

WALTER A. McFARLANE
Deputy Attorney General

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ALPHA GRAPHICS, INC. • WASHINGTON, D.C. • (202) 331-8101

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IN THE

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COMMONWEALTH OF VIRGINIA
Division of Motor Vehicles,

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WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS

STATEMENT OF THE CASE

Respondents submit the following as a supplement to Petitioner's statement of the case:

1. The "Communiplate" program dates from 1981, when Commissioner Williams approved the use of six alpha characters on "personalized or "reserved" or "vanity" license plates. The authority to issue such plates dates from 1972, with the enactment of Va. Code § 46.1-105.2(a), which delegates to the Commissioner of the Department of Motor Vehicles, ("DMV") complete discretion as to whether to implement such a program. From 1972 to 1981 the DMV Commissioner permitted the use of only three alpha characters plus three numbers on each reserved license plate, so that the combination of words available was quite limited. Nevertheless, even at that time, Respondents had established a policy to disallow the use of certain combination of letters, and had included among those combinations the word "GOD."

2. The "Communiplate" program is a revenue-producing activity for the Commonwealth of Virginia. That is why it exists in Virginia and why similar programs exist in other states, and that is why it is "aggressively marketed" by Respondents. (Petitioner's Appendix A4)

3. Respondents have admitted that there are no formal regulations governing the issuance of "Communiplates", but there is no requirement that formal regulations be in place in this situation. The trial court found as a matter of fact that a policy had been established to prevent the display of religions or deities on license plates and that Petitioner had not been singled out for special treatment under that policy because of his religious beliefs. (Pet. App. A4, A6, A12.)

4. Virginia license plates, by statute, remain the property of the State (Va. Code § 46.1-102.)

5. The Commissioner of DMV, by statute, has absolute discretion as to whether or not there shall be a reserved license plate in Virginia, and how it shall be implemented. (Va. Code § 46.1-105.2.)

SUMMARY OF ARGUMENT

I. There is no substantial federal question involved in this case. The Constitutional provisions allegedly violated are substantial, of course, but the lack of other reported cases dealing with personalized license plates indicates that this is not a burning issue crying out for resolution by the highest Court in the land. The interest of an individual in the use of the six characters on a motor vehicle license plate simply does not rise to the same level of importance that the right to demonstrate or meet and debate in public areas has been accorded in our Constitutional system.

II. An automobile license plate is not a public forum. An automobile license plate might be classified as an "unusual

forum" but it should not be classified as a public forum for purposes of First Amendment analysis. Rather it should be considered nonpublic in nature and therefore amenable to reasonable restrictions established by the state, including restrictions which are based on message content. A holding by this Court that license plates are a public forum would create insurmountable difficulties in the administration of personalized license plate programs everywhere. That fact alone is a strong indication that DMV had no intention of creating a public forum when it instituted the "Communiplate" program.

III. There has been no violation of Petitioner's freedom of expression. There is no violation of an individual's freedom of expression in establishing reasonable restrictions on the use of state-owned property that is not a public forum. Moreover, even if license plates were to be considered a public forum, the policy established by DMV to exclude references to deities and religions on license plates serves a compelling state interest and is narrowly tailored to accomplish that end, so that it passes constitutional muster even under a strict scrutiny test.

IV. There has been no violation of Petitioner's rights under the First and Fourteenth Amendments. The "void-for-vagueness" argument raised by Petitioner in the third section of his argument is a doctrine which relates to criminal statutes which fail to warn individuals of what conduct is proscribed and punishable. That doctrine applies to criminal cases. It does not apply to restrictions on the issuance of personalized license plates. Accordingly, Petitioner's argument in this regard appears to be inapposite. Also inapposite is Petitioner's assertion that it is a violation of constitutionally protected rights to have a policy making revocation of a personalized license plate dependent on a single complaint. That argument is inapposite because there is no such policy.

REASONS FOR DENYING THE WRIT

ARGUMENT

I

THERE IS NO SUBSTANTIAL FEDERAL QUESTION INVOLVED IN THIS CASE

It might be said that this case involves what the dissenting Justices in *Perry Ed. Assn. v. Perry Local Ed. Assn.* 406 U.S. 37, 60 (1983) called an "unusual forum." In that dissenting opinion it was pointed out that:

> "this Court has not always required content neutrality in restrictions on access to government property. We upheld content-based exclusions in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), in *Greer v. Spock*, 424 U.S. 828 (1976), and in *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977). All three cases involved an *unusual forum*, which was found to be nonpublic, and the speech was determined for a variety of reasons to be incompatible with the forum." (Emphasis added.)

The Respondents submit that a motor vehicle license plate is an unusual forum if ever there was one. Quite arguably a license plate is not a forum at all, public or nonpublic. It contains space for only six characters; room, perhaps, for one or two short words. The plate at issue in this case, "ATH-EST," does not even spell the intended word, "atheist," because of the six character limitation. There is nothing on the plates but the name of the state, the date of expiration, and the six (or fewer) characters. The six characters are chosen at random from an available pool by DMV personnel, unless the vehicle registrant requests a "Communiplate" and pays the extra ten dollar (annual) fee.

A request for a "Communiplate" will be honored, provided the combination of characters requested is available. If the combination requested has been issued earlier to someone else, it is not available (the plates are part of the state's registration and identification system, so that each plate must be unique). If the combination is among those which the DMV will not issue under the policy established to preclude the issuance of plates which are lewd, vulgar, obscene, or which make reference to drug culture, deities, or religions, it will also be considered not available.

A forum which permits the use of only six characters (and then only if someone else has not already chosen the same combination of characters) is extremely limited and very unusual to say the least. Such a forum is a far cry from public streets, sidewalks and parks. It is a far cry, too, from university meeting rooms where students "participate in the intellectual give and take of campus debate" (*Widmar v. Vincent*, 454 U.S. 263, 267-268, N.5 (1981)), or a school mail system where messages can be exchanged (*Perry Ed. Assn. v. Perry Local Ed. Assn.*, supra), or even a solicitation for a charity drive which is limited to 30 words (*Cornelius v. NAACP Legal Def. & Educ. Fund*, _____ U.S. _____, 105 S. Ct. 3439 (1985). There is no debate, no "give or take," no exchange of ideas possible on a license plate. There is no room for the kind of intereplay of ideas and public debate that the First Amendment was designed to protect.

Respondents are in no way precluding Petitioner from expressing his views by depriving him of a particular license plate. He can and does express those views on bumper stickers and signs on his automobile. The metal or plastic holder for his license plate is available for his use. He may express himself as he wishes anywhere on his motor vehicle, except for the one part of that vehicle which belongs to the state, and which is clearly identified with the state, the license plate.

The impact on an individual's freedom of expression caused by limiting his unfettered use of the six characters on a license plate is miniscule. The alternative methods for expression are virtually unlimited, even within the confines of Petitioner's automobile and certainly elsewhere, and are far superior in terms of expressing concepts and exchanging ideas completely and directly.

Respondents submit that the history of litigation on the subject of personalized license plates indicates that most persons do not consider the use of license plates for expressive purposes as a significant issue. Respondents have found but one reported case dealing with personalized license plates. *Katz v. Department of Motor Vehicles*, 32 Cal. App. 3d. 679, 108 Cal. Rptr. 424 (1973). Personalized license plates have been around since the 1930's, and states have consistently limited the subject matter to be permitted on those plates. The fact that there has been only one reported case determining a state's authority to control the content of such plates in all that time,and that that one case is now fourteen years old, seems to indicate that individuals do not consider license plates critical to their ability to express themselves.

Jurisdiction to review a case by writ of certiorari under 28 U.S.C. § 1257(3) is predicated on the existence of a substantial federal question. *Zucht v. King*, 260 U.S. 174 (1922). Although the precise parameters of that standard are not clear, Respondents submit that the issue of an individual's right to a particular license plate to identify his vehicle under a state's motor vehicle registration laws does not rise to the level of a burning federal question demanding resolution by the highest Court of the land. There is no conflict among the Federal Circuits or among the states on this issue. The *Katz* case apparently is the only reported case, ever, on this issue. There have been no cases in federal court whatever. It appears that there has been no real interest in this issue. Petitioner has urged that a decision in this case could serve to limit future litigation on this

question. (Pet. 12,23.) Respondents submit that there has been no such litigation in the past and there is no indication that there will be any in the future.

Petitioner apparently is quite sincere in his belief that he should be allowed the license plate of his choice. Respondences applaud his willingness to pursue his beliefs. Nevertheless, it appears from the history of litigation in this area that no one else has considered a license plate to be a particularly important forum for expression. Respondents submit that any federal question involved in this case is not of such significance as to warrant a grant of certiorari.

II

A PERSONALIZED AUTOMOBILE LICENSE PLATE IS NOT A PUBLIC FORUM

Petitioner contends that Respondents have somehow converted vehicle license plates, which are nothing more than physical evidence of vehicle registration and identification, to a public forum. He contends that Respondents have shown their intent to create a public forum by marketing the license plates to members of the public as a means of expressing themselves.

Respondents submit that "Communiplates" are marketed to the public as a means of producing revenue for the state. License plates must be issued for every vehicle in any event, in order to identify the vehicle and indicate that it has been registered. Traditionally the license plates were marked with letters and numbers with no meaning outside of the registration/identification scheme, and there was no question that a state had complete discretion to control the letters and numbers that were used in such a system. When it became apparent that some individuals were willing to pay extra to have plates with certain combinations of letters, "personalized" or 'vanity" license plate as they are often called, the states discovered that with only slight alterations in their registration/identification systems they could tap a new revenue source.

The states were happy to alter their registration systems slightly to allow individuals some choice in the content of their license plates. Nevertheless, the plates remain a part of the registration system. Only one license plate containing a particular combination of characters can be issued by a state no matter how many people may want that combination. There can be no right to a particular combination of letters, since the combination might already be taken.

The reason for issuing personalized plates, and the reason that such plates are advertised, is to raise revenue. There was never an intention on the part of Respondents to create a public forum in a constitutional sense by advertising and marketing personalized license plates, any more than a store which advertises a product for sale intends thereby to make its premises a public forum, or any more than the transit company in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), intended to create a public forum by accepting commercial advertising.

Petitioner cites *Widmar v. Vincent*, 454 U.S. 263, 267, for the proposition that the government may "create a public forum for the expression of ideas by intentionally opening a non-traditional forum for public discourse." (Pet. 8.) Respondents submit that *Widmar* does not stand for the proposition for which Petitioner cites it. *Widmar* involved the use by students of meeting rooms at a state university. The footnote on the page cited by Petitioner clearly points out that public universities have *traditionally* been considered a public forum, at least for students, calling such universities "the marketplace of ideas." 454 U.S. at 267, N.5. In any event, the forum involved in the *Widmar* case is clearly different in kind from the forum in this case. It is difficult to see how the six letters on a vehicle license plate could be considered remotely similar to a "marketplace of ideas". The First Amendment was clearly designed to protect and promote debate and the exchange of ideas. Meeting rooms are places where debate and exchanges can take place. License plates simply are not.

The cases cited by Petitioner, including *Widmar; Perry Educ. Assn. v. Perry Local Educ. Assn.*, supra; *United States v. Grace*, 461 U.S. 171 (1983); and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), do discuss the distinction between a public and a nonpublic forum for purposes of First Amendment analysis. As Petitioner points out, such cases have looked to such factors as the policy and practice of the government with regard to the property, the nature of the property, and its compatibility with expressive activity to discern whether a public forum (or limited public forum) or nonpublic forum is involved. (Pet. 8.) Respondents submit that consideration of those factors in this case indicates that a license plate should be considered a nonpublic forum.

A license plate most certainly cannot be considered a traditional public forum as that term has been used by this Court. Respondents submit that license plates also should not be considered a limited public forum, in spite of any marketing effort by DMV to encourage individuals to purchase such plates. Such marketing was done with the intent of raising revenues. There was no intent to create a public forum in a First Amendment sense.

Respondents submit that the nature of a license plate and its incompatibility with expressive activity also indicate that a license plate should be considered a nonpublic forum. In fact, license plates probably should not be considered a forum at all in light of such factors. The confines of six characters for expressing ideas is extremely limited. The ability to exchange ideas, to debate, to engage in the give and take of communication that the First Amendment was designed to protect is non-existent. At most a personalized license plate might be considered comparable to a small placard expressing a single word thought, and while a placard might well be something one would carry in a public forum, it is not itself a public forum.

Moreover, the requirement that the six characters chosen fit into the state's registration system means that, even at best,applicant is not free to choose what he wants to say

because someone else may have chosen to say it already. With nearly 400,000 "Communiplates" already issued, many of the combinations that an individual might want to use have been spoken for.

The result of a holding that a personalized license plate is a public forum may well be that such license plates would no longer be issued. There appears to be no middle ground: if the plates are a public forum then presumably the states cannot control the content of such plates unless they are obscene. Given decisions of this Court such as the holding in *Cohen v. California*, 403 U.S. 15 (1971), that the word "FUCK" is not obscene, it is difficult to imagine any combination of six characters that could possibly be considered obscene. It would appear, therefore, that states could exercise no control whatever over license plates if they are considered a public forum.

Even Petitioner, through his counsel, has admitted that the states have an interest in excluding certain words from license plates. Petitioner's counsel had trouble articulating a standard which would pass constitutional muster, however, stating at one point that perhaps words that are "totally gross" could be controlled, and stating that "it is a totally gray area". (Tr. 32,37.) Respondents agree that it is a gray area. Line drawing as to what should and should not be allowed on a license plate is difficult. Nevertheless, Respondents submit that no state will willingly issue a license plate with the word "FUCK" on it, and that they should not be required to do so by a ruling from this Court that license plates are a public forum.

Respondents acknowledge that difficulties in establishing where to draw the line on license plates cannot stand in the way of First Amendment freedoms, but Respondents submit that such difficulties are more than just an excuse for Respondents' position in this case. They are part and parcel of the nature of license plates and the states' concerns and practices with regard to those plates, factors which this Court has looked to in determining whether the

government intended its property to become a public forum.

The states do have an interest in controlling what appears on the license plates they issue. *See, Katz v. Department of Motor Vehicles*, supra. Petitioner has admitted as much. Whether that interest amounts to a compelling state interest is another matter. If it does, then Respondents submit that Petitioner has lost his case. If it does not, and if license plates are to be considered a public forum, then the states will be placed in an untenable position from which the only recourse will likely be to abolish personalized license plates. Again, Respondents submit that this is a further indication that the states had no intention of creating a public forum by offering personalized plates.

III

THERE HAS BEEN NO VIOLATION OF PETITIONER'S FREEDOM OF EXPRESSION

In part II of his argument, Petitioner cites *Carey v. Brown*, 447 U.S. 455 (1980); *United States v. O'Brien*, 391 U.S. 367 (1968) and *Widmar v. Vincent*, supra, for the proposition that regulation of speech on the basis of content is subject to exacting scrutiny and will be permitted only upon a showing that it serves a compelling state interest and is narrowly drawn to achieve that end. (Pet. 13.) Respondents do not deny that Petitioner's proposition is accurate with regard to access to a public forum, but Respondents deny that motor vehicle license plates constitute a public forum for purposes of the First Amendment, for the reasons stated in part II of this Argument. Nevertheless, Respondents submit that the policy established by DMV to preclude the use of words referring to deities and religions is constitutional even under the strict scrutiny standard required for a public forum.

As stated in Part II of this Argument, even Petitioner has admitted that the state has an interest in controlling the contents of its license plates. The plates are identified with the

state. They have the name of the state on them. In fact, the name of the state and the six characters are the only things on the plates other than stickers indicating an expiration date. There is no getting around the fact that individuals who read the message on a "Communiplete" will also see the name of the state, and that the state and the message will be associated visually. Respondents submit, and Petitioner has admitted (Tr. 32-37) that there will be an association between the state and the message in the mind of the reader, an association which may well be read as an implicit endorsement of the message by the state. Accordingly, Petitioner, through his counsel, has admitted that the state has an interest in controlling some messages, including those that are "totally gross," although he admits that he does not know where to draw the line. (Tr.37.)

Respondents submit that the Commonwealth has a compelling interest in controlling lewd, vulgar and otherwise offensive words on its license plates. It submits also that it has a compelling state interest in not permitting references to deities and religions on its license plates, because such references could be construed as implicit endorsement of such religions by the state, in violation of the Establishment Clause.

This Court has held that the interest of a governmental entity in complying with its constitutional obligations with regard to the Establishment Clause of the First Amendment may be characterized as a compelling state interest. *Widmar v. Vincent*, supra, 454 U.S. at 271. It is precisely that interest which Respondents submit makes its actions with regard to Petitioner's license plates not only appropriate but necessary. The DMV policy with regard to deities and religions assures that it cannot be seen as endorsing those deities and religions, and, accordingly, helps satisfy its Constitutional obligation.

Furthermore, as this Court has held, a state may not constitutionally "aid all religions as against non-believers" or "aid those religions based on a belief in the existence of God

as against those religions founded on different beliefs." *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). Respondents submit that it follows from that rule that a state also cannot constitutionally aid nonbelievers as against religious believers. Accordingly, because Virginia does not allow references to deities or religions on its license plates, it must also disallow references to atheism.

Petitioner has contended that any such "religious neutrality" problem should be resolved, not by forbidding all religious references, but by adopting an open forum or equal access policy. (Pet. 15.) It is true that in the *Widmar* case this Court held that the government entity involved had violated the First Amendment rights of its students by forbidding the use of meeting rooms by religious groups rather than adopting an open forum approach which would have satisfied the state's obligation of neutrality under the Establishment Clause without interfering with the individuals' rights to exercise their religious freedom. Respondents submit, however that an open forum policy would not be workable in this case, because such an approach would lead to an entanglement of the state with religion.

The *Widmar* case makes use of a three pronged test described in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) to determine whether an open forum approach would be appropriate under the Establishment Clause. The third prong in that test is that it "must not foster 'an excessive government entanglement with religion.' " 454 U.S. at 271. Respondents submit that an open forum approach to personalized license plates containing religious references does not satisfy that prong of the test, at least so long as it is assumed that the state has a legitimate interest in excluding lewd, vulgar, or otherwise distasteful words from its license plates. An open forum approach likely would find DMV personnel in the position of determining whether applications for licenses such as "FUK GOD," "I AM GOD," "GOD SUX," "DOG GOD," and the like are

statements of religious beliefs which must be allowed under the First Amendment, or are merely vulgarities which can be forbidden. Respondents submit that such decision making is precisely what the policy adopted by DMV avoids, and that such decision making should be avoided because it entangles the state in religious matters.

Respondents submit that the only way to avoid such entanglements with religion is the method DMV has chosen: to disallow references to deities and religions on license plates, and to enforce that policy equally as to believers and nonbelievers.

IV

THERE HAS BEEN NO VIOLATION OF PETITIONER'S RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

In section III of his argument, Petitioner alleges that "DMV has failed to articulate any standards by which license plate applications are evaluated." He also alleges that it is "admitted by the Respondents, that the complaint of one individual will result in revocation of a personalized license plate which has already been issued." (Pet. 18.)

Respondents have admitted that there are no published regulations pertaining to personalized license plates, but Respondents deny that that means that no standards exist. Respondents have submitted, and the trial court found, that a policy was in place prohibiting the issuance of license plates referring to a deity or religion (Pet. App. A6.)

Moreover, Respondents strongly deny that they have ever admitted that the complaint of one individual will result in revocation of a personalized license plate. Commissioner Williams, in answer to a question posed by Petitioner's attorney, stated that "it only takes one complaint to come to my office before it gets *acted on*." (Pet. App. A30, emphasis added.) Respondents deny that

"acted on" means that the license will be revoked. "Acted on" means that the license plate will be reviewed in light of DMV's policies. Revocation would occur if, and only if, the plate violates those policies, not merely because a complaint was received. Respondents have admitted that it may take a complaint to bring an offending license plate to the attention of DMV so that a review of the plate in light of DMV's policies can be made. That does not mean, however, that a complaint is either necessary, or sufficient in and of itself, to cause revocation. Many complaints to DMV about offensive license plates have not resulted in revocation of the plates. (Tr. 6-8.) Accordingly, Respondents submit that Petitioner's reliance on the case of *Larkin v. Grendel's Den, Inc.* 459 U.S. 116 (1982) is misplaced. A citizen's complaint about a license plate does not cause revocation of the plate and therefore is not a veto over the expression on that plate. A citizen's complaint serves merely as a notice to DMV that a review of the plate should be made.

Petitioner cites *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); and *Cox v. Louisiana*, 379 U.S. 536 (1065) for the proposition that "[d]ue process requires that any statute or regulation having the effect of curtailing free expression contain reasonably clear guidelines so as to prevent official arbitrariness or discrimination in its enforcement." (Pet. 20.) Respondents submit that all three of the cases cited deal with the "void-for-vagueness" doctrine which has been developed as a tool for addressing the requirements of due process cases involving criminal statutes.

The void-for-vagueness doctrine is grounded on the requirement that a criminal statute must provide fair warning to the public of what is proscribed. So far as Respondents have been able to ascertain, the void-for-vagueness doctrine has been applied only to criminal cases, and Respondents submit that there is no reason why it should be extended to reach a case such as this one. Neither the Petitioner nor anyone else is in danger of being

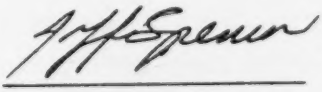
prosecuted on the basis of the contents of his "Communiplate." There is no requirement that anyone be forewarned of what is proscribed on "Communiplates" where the only "penalty" is that he will not be able to obtain what he would like.

Moreover, to the extent that DMV's policy prohibits the display of deities and religions on reserved license plates, regardless of the message which might be intended by the license applicant, it is clear to DMV personnel what is to be prohibited by such policy so that the risk of arbitrary or discriminatory application of the policy by such personnel is greatly reduced. It is not the message that the policy prohibits, it is the use of the words which refer to deities or religions (or non-religions). Accordingly, the policy forbids "LUV GOD" as well as "GOD SUX," and DMV personnel know it.

CONCLUSION

For the reasons stated herein, Respondents submit that this Court ought to deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,



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